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No. 656

# Supreme Court of the United States

October Term, 1946

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A. M. ANDERSON, Receiver of the National Bank of Kentucky, Louisville, Kentucky,

*Petitioner,*

v.

LAWRENCE S. HELMERS, et al.,

*Respondents.*

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### STATEMENT

In the petition for the writ, there are some statements which are not accurate or which require supplement or explanation. For example, the District Court filed a "Memorandum and Decision" (R. 23-25) which decided only (R. 24 bot.) that the defense of the statute of limitations was properly raised by motions to dismiss and gave no reason for not sustaining the motions on that ground. The reason ascribed in the petition (p. 3) for the holding in the District Court is, therefore, pure surmise.

The opinion of the Sixth Circuit is not, as stated in the petition (p. 2),

> ". . . in direct conflict with the decision of . . . the Third Circuit on the same matter. . . ."

That it is not "on the same matter" will be shown later in this brief.

This action was not, as stated (p. 8),

> ". . . stayed pending the decision of this Court in *Anderson v. Abbott*,"

but the long delay resulted because

> "Action in this case was suspended until that litigation, on the issues other than Statute of Limitations, could be finally disposed of. . . ."

by this Court [156 F. (2d) at 49; R. 5].

The statement (p. 9 bot.) that defendants

> ". . . were not stockholders in . . a Kentucky bank . . ."

is true only if, by it, is meant a Kentucky state bank. But the National Bank of Kentucky was essentially a Kentucky institution. The Stipulation as to Facts (R. 26), not mentioned by petitioner, shows both that the organization certificate of the National Bank of Kentucky localizes it in the City of Louisville and (par. 2) its

> ". . . business . . . was . . . actually carried on and transacted in Louisville . . . Kentucky, and in no other place."

There was no such stipulation in the Third Circuit case. The importance of this difference in the two cases will be shown later.

Again, the petition fails to state some of the material allegations in the bill of complaint which, on motion to dismiss, are conclusively accepted as correct and which enter to an important extent into the decision. Thus, after reciting in paragraph VI of the bill (R. 5) that the Comptroller levied

". . . an assessment and requisition upon the shareholders of said The National Bank of Kentucky for $4,000,000.00, to be paid by them on or before the First day of April, 1931, and did make demand upon each and every one of them for the par value of each and every share of the capital stock of said association held or owned by them respectively, at the time of its failure; and said Comptroller of the Currency did thereupon direct the Receiver of the National Bank of Kentucky to take all necessary proceedings by suit or otherwise to enforce the individual liability of said shareholders."

the bill further alleges in paragraph XVII (R. 15):

"By reason of the foregoing, the defendants . . . have promised to pay said assessment . . . and each of the defendants appearing to be stockholders of the Banco-Kentucky Company is liable for the payment of the assessment levied by the Comptroller . . . hereinbefore referred to. . . ."

and contains a paragraph XVIII (R. 15), which begins:

"Acting pursuant to the authority and direction of the Comptroller of the Currency, the Receiver of the National Bank of Kentucky, on or about March 20th, 1931, sent and served upon each of the defendants and all the other shareholders of the BancoKentucky Company, the following assessment notice:"

followed (R. 16) by the assessment notice in full. This assessment notice, it will be observed, is headed:

"Office of the Receiver
THE NATIONAL BANK OF KENTUCKY
Louisville, Kentucky

Louisville, Ky., March 20, 1931"

and recites that the Comptroller:

". . . levied an assessment upon the stockholders of The National Bank of Kentucky, Louisville, Ky., on the

par value of each and every share, *payable at the Office of the Receiver, on or before April 1, 1931.*" (Emphasis ours)

Paragraph XVIII further continues (R. 16 bot.):

"Enclosed therewith and attached thereto was a copy of the order of assessment upon shareholders made by the Comptroller of the Currency of the United States hereinabove described."

By the Stipulation as to Facts, the "assessment and requisition of the Comptroller" was made Exhibit 1 (R. 27) and the notice referred to in paragraph VIII, Exhibit 2 (R. 29), and it was stipulated that these matters should be considered by the Court on hearing of the motions to dismiss with the same effect as if such facts had been alleged in the complaint (R. 27).

The Receiver petitioner, therefore, is confronted with a conclusive record that when the Receiver enclosed the assessment requisition and demand for payment of the Comptroller, including the Comptroller's authorization for the Receiver to take

". . . all necessary proceedings . . . to enforce the individual liability of said shareholders, . . ."

and the Receiver sent the assessment notice from his office in Louisville making the assessment

". . . payable at the Office of the Receiver, . . ."

the Receiver was:

"XVIII. Acting pursuant to the authority and direction of the Comptroller. . . ."

## ARGUMENT

### I. The Supposed Conflict Involves Only Questions of the Proper Interpretation of Different State Statutes of Limitations.

The petitioner refers (pp. 6 bot., 9 top) to "an important question of federal law." But this case involves only the construction and application of a state statute of limitations. This is also true of the Third Circuit decision, *Anderson* v. *Andrews, et al.*, 156 F. (2d) 972, which petitioner asserts is in conflict. Both the Court of Appeals for the Sixth Circuit and for the Third Circuit held, in accordance with the decisions of this Court [*Fisher* v. *Whiton*, 317 U. S. 217 (1942); *Rawlings* v. *Ray*, 312 U. S. 96 (1941); *Pufahl* v. *Est. of Parks*, 299 U. S. 217 (1936); *McClaine* v. *Rankin*, 197 U. S. 154 (1905); *McDonald* v. *Thompson*, 184 U. S. 71 (1902)], the actions before them were governed by the limitations of the state in which the suit had been brought. The Sixth Circuit opinion states:

> "It is conceded by the parties herein that the Federal statutes provide no period of limitation for actions to enforce liability of national bank stockholders, and accordingly the statute of limitations of the state in which the action is brought is applicable. *Rawlings* v. *Ray*, 312 U. S. 96." [156 F. (2d) at 49; R. 5-6.]

The Third Circuit opinion states:

> "There is no federal statute of limitations limiting the time in which shareholders' liability in a national bank may be enforced. The local law of limitations, therefore, is applicable." [156 F. (2d) at 973.]

Each court, having thus disposed of the preliminary question (as to which there is no dispute), then proceeded to determine whether the action before it was barred by the local statute of limitations. The Sixth Circuit described

this issue as "the narrow question 'where the cause of action arose' as the words are used in the Ohio Borrowing Statute" (R. 7) and held the Ohio action was outlawed by the Ohio statute of limitations. The Third Circuit Court held the Pennsylvania action was not barred by the Pennsylvania statute of limitations. Thus, if there is any conflict, it is merely a conflict on questions of state law in different states. It amounts to nothing more than that the Sixth Circuit Court has applied an Ohio statute differently from the way in which the Third Circuit has applied a similar but by no means identical Pennsylvania statute. No federal question of any kind is involved in the alleged conflict. Nowhere does petitioner assert that the decision of the Sixth Circuit Court of Appeals is not in conformity with Ohio law.

Since *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64 (1937), a conflict in Circuit Court of Appeals decisions on questions of state law has not been regarded as a reason for granting certiorari. In *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202 (1937), it is stated (p. 206):

> "Rule 38 (5) of the Supreme Court Rules indicates that this Court will consider, as a reason for granting a writ of certiorari, the fact that 'a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter.' . . . As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts. The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.' No such showing was attempted by the petition. Nor was it contended that the decision below was 'probably untenable' and therefore

probably in conflict with the state law as yet unannounced by the highest court of the State."

In the Third Circuit case Judge Goodrich observes

"'. . . that the Pennsylvania borrowing statute provides a defense to an action 'brought in any of the courts of this Commonwealth.'" [Footnote 9, 156 F. (2d) at 974.]

and suggests that perhaps the borrowing statute is not, therefore, applicable to the United States District Court sitting in Pennsylvania, but makes nothing of the point. However, it was decided in *David Lupton's Sons* v. *Automobile Club*, 225 U. S. 489, that if a state statute merely prohibits a non-complying foreign corporation from maintaining an action in the courts of the state, such a prohibition does not prevent suit in the federal courts. The language quoted does not appear in the Ohio statute of limitations and it is possible that the two Circuits, although reaching opposite conclusions with respect to liability, both decided correctly, the one interpreting the Pennsylvania statute of limitations, the other the Ohio.

## II. The Instant Case Was Heard on Facts Not Shown or Necessarily Implied in the Third Circuit Case.

The Third Circuit case was heard solely upon the complaint and a motion to dismiss. The instant case was heard on a stipulation of facts, previously mentioned, as well as on the pleadings (R. 26). The stipulation brought into the case the following facts which do not appear in the complaint:

"1. The organization certificate of The National Bank of Kentucky states that the place where its operations of discount and deposit are to be carried on is the City of Louisville, Jefferson County, State of Kentucky.

"2. The business of The National Bank of Kentucky was at all times actually carried on and transacted in Louisville, Jefferson County, Kentucky and in no other place.

* * * * * *

"It is further stipulated and agreed that the foregoing facts may be considered by the court on hearing of the various motions to dismiss with the same effect as if such facts were alleged in the complaint." (R. 26, 27.)

Clearly, these facts are of significance in determining where the cause of action arose. They are referred to in the Sixth Circuit opinion [156 F. (2d) at 51; R. 10] and are a basis for it. These facts could not have been considered by the Third Circuit, for they do not appear in the complaint.

Moreover, in the Sixth Circuit it was shown and argued that a national bank, although organized under federal law, is a highly localized institution. Not only is its business restricted to the city specified in the organization certificate, but its place of business may be changed only with the consent of the Comptroller, and then only in the same state. 12 U. S. C. Sec. 30. The requisite amount of capital with which a national bank may commence business is determined by the population of such city. 12 U. S. C. Sec. 51. Its list of shareholders, open to the inspection of all creditors, must be kept in the office where its business is transacted. 12 U. S. C. Sec. 62. Three-fourths of its directors must reside in the state where it is located and must continue to reside there. 12 U. S. C. Sec. 72. It may consolidate only with such other national or state banks as are located within the same state. 12 U. S. C. Sec. 33, 34(a). A national bank may, under certain circumstances, operate branches but such branches must be within the state where the national bank is located. 12 U. S. C. Sec. 36.

Consequently, it has been frequently held that a national bank is a resident of and is domiciled in the state where it is located. *In re Standard Oak Veneer Co.*, 173 Fed. 103 (D. C. Tenn. 1909); *Schmitt* v. *Tobin*, 15 Fed. Supp. 35 (D. C. Nev. 1935.)

Significantly the very first allegation of the complaint is that the National Bank of Kentucky is:

> "... *domiciled* at Louisville, Jefferson County, in the Western District of Kentucky" (R. 1).

By an express statutory provision a national bank is, for jurisdictional purposes a "citizen" of the state in which it is located. 28 U. S. C. Sec. 41 (16). It may be sued only in the district in the state where it is located, 12 U. S. C. Sec. 94; *Leonardi* v. *Chase National Bank* (2nd Cir. 1936), 81 Fed. (2d) 19, certiorari denied, 298 U. S. 677.

It is apparent, therefore, that all the operative facts that gave rise to this assessment occurred in Kentucky and in no other place. The bank was located and domiciled in Louisville, Kentucky; its business operations were carried on exclusively there, and the insolvency itself occurred there. There is no stipulation in the Third Circuit, as in the present record, that the entire business of the National Bank was transacted in Louisville and in no other place. We venture to assert that the decision sought to be reviewed is correct in holding the obligation is due at the place where the obligation should be met and that the cause of action arises where the breach occurs, i. e., where the obligation is not met.

## III. The Decision of the Sixth Circuit Court of Appeals Is in Accord with Applicable Decisions of This Court.

(a) Petitioner urges that "the decision of the Sixth Circuit holding that the cause of action was contractual in character" is in conflict with applicable decisions of this

Court (Pet. 8, 9). There is not even a suggestion in the Circuit Court's opinion, however, that it considered the liability contractual or that such a view formed a basis for its decision. On the contrary, the Court of Appeals expressly stated:

> "It is also agreed that the complaint sets forth an action 'upon a liability created by statute.'" [156 F. (2d) at 49 bot.]

Actually this Court has frequently held that the double liability of national bank stockholders is "quasi-contractual in its origin and basis." See *Brown* v. *O'Keefe*, 300 U. S. 598 at 606 (1936), and cases cited therein. The liability is so far contractual that it has been held to be dischargeable in bankruptcy as a liability upon an "implied contract." *Brown* v. *O'Keefe*, supra.

(b) The decision of the Court of Appeals is not in the slightest inconsistent as petitioner suggests it is with *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946). The *Holmberg* case involved stockholders' liability under the Federal Farm Loan Act (39 Stat. 360, 374, 12 U. S. C. Sec. 812). The only remedy provided by that Act for enforcement of the liability is a creditors' suit in equity in which the Court must first determine the existence and extent of insolvency, and the amount of shareholders' liability. This Court held that in such an action the federal courts were not bound by the state statute of limitations because the action involved "not only a federally-created right but a federal right for which the *sole* remedy is in equity." (Emphasis ours.)

Under the National Bank Act, the existence of insolvency and the amount of shareholders' liability is determined administratively by the Comptroller of the Currency (12 U. S. C. Secs. 191 and 192). The receiver may then bring an action at law against shareholders on the Comptroller's

assessment. *Russell* v. *Todd*, 309 U. S. 280 at 286. In the case of a "full" or 100% assessment, such as is involved here (R. 5), it has frequently been held that the receiver's action *must* be at law. *Kennedy* v. *Gibson*, 8 Wall. 498 (1869); *Casey* v. *Galli*, 94 U. S. 673 (1876); *Hale* v. *Allinson*, 188 U. S. 56 (1902); *Church* v. *Hubbard, et al.*, 91 F. (2d) 406 (C. C. A. 6, 1937); *Aufdenkamp* v. *L'Herrison*, 56 F. (2d) 344 (C. C. A. 9, 1932). When, as in the case at bar, the receiver elects to proceed in equity in order to obtain a more convenient remedy and to avoid a multiplicity of suits, the jurisdiction of law and equity is "concurrent," and "equity will withhold its remedy if the legal right is barred by the local statute of limitations." *Russell* v. *Todd*, supra at 289; *Godden* v. *Kimmel*, 99 U. S. 201; *Overfield* v. *Pennroad Corp.*, 146 F. (2d) 889 (C. C. A. 3, 1944; *Bailey* v. *Tillinghast*, 99 Fed. 801 (C. C. A. 6, 1900).

The distinction between a creditor's suit in equity against stockholders of a joint stock land bank and a receiver's suit against stockholders of a national bank is clearly set forth by the late Chief Justice Stone in *Russell* v. *Todd*, supra, at 286, 290-291. See also *Christopher* v. *Brusselback*, 302 U. S. 500 (1937). The limitation rules applicable to these two classes of suits are entirely different. It has never been questioned by this Court that state statutes of limitations are applicable to actions in the federal courts to collect national bank assessments. See cases cited *supra*, p. 5.

In the *Andrews* case the Third Circuit did not purport to follow the *Holmberg* case, but merely cited it as indicating an "approach" to the question where the cause of action arose within the meaning of the Pennsylvania Borrowing Statute. The language of the opinion of this Court in the *Holmberg* case, quoted by Judge Goodrich (p. 975) refers to

> ". . . enforcing an equitable right created by Congress."

The right to sue on a national bank assessment is to sue at law for a debt, if desired. The right to sue in equity is not created by Congress, but arises from ordinary equitable principles.

(c) The law is now settled by decisions of this Court that a cause of action to recover a national bank stock assessment arises at the *time* the assessment is payable. *Rawlings* v. *Ray*, supra. The decision of the Sixth Circuit conforms to this principle and holds also that the cause of action arises at the *place where* the assessment is payable and where all the operative facts which give rise to the cause of action, including the insolvency of the bank, occur.

## IV. The Decision of the Court of Appeals Is in Conformity with the Law of Ohio, Federal Decisions and General Law.

Petitioner urges that the cause of action could not have arisen in Kentucky within the meaning of the Ohio statute because the respondents "never resided in Kentucky" and that it is

> ". . . anomalous to say that the cause of action arose in Kentucky where defendants have never been and where no action against them could be brought."

However, respondents' residence affected only venue, an entirely different matter from where the cause of action arose. The Supreme Court of Ohio in *Payne* v. *Kirchwehm*, 141 O. S. 384, app. dis. 320 U. S. 706 (1934), and the federal courts and courts of last resort of numerous states have held that the defendant's residence has no bearing on the place where the cause of action arose. In *Anglo-American Land M. & A. Co.* v. *Lombard*, 132 Fed. 721 (C. C. A. 8, 1904), Mr. Justice (then Circuit Judge) VanDevanter stated:

"The place where a cause of action arises is not determined by inquiring where it may be enforced. The two things are not the same. The right of action must arise, come into being, before it can be enforced anywhere, and when it has arisen the action for its enforcement, unless purely local, may be maintained in any state." (132 Fed. at 750.)

See, to the same effect, *Klotz* v. *Angle*, 220 N. Y. 347, 116 N. E. 24 (1917); *McKee* v. *Dodd*, 152 Cal. 637, 93 Pac. 854 (1908); *West* v. *Theis*, 15 Idaho 167, 96 Pac. 932 (1908).

In the present case, if the Receiver could not get service on the defendants in Kentucky, his counsel could have crossed the bridge over the Ohio River to Cincinnati any day after April 1, 1931, instead of waiting to do so until more than five years later, December 12, 1936.

## V. The Question Involved in This Case Is Unlikely to Recur.

Since the institution of this action, double liability of national bank shareholders has been virtually eliminated. Such liability does not apply with respect to any shares issued after June 16, 1933 [48 Stat. 189, 12 U. S. C. Sec. 64(a)], and Section 304 of the Banking Act of 1935 permits all national banks to terminate liability on outstanding shares merely by the publication of a notice [49 Stat. 708, 12 U. S. C. Sec. 64(a)]. Although there is no record of the national banks that have availed themselves of this exemption, it is reasonable to suppose that, in the more than ten years intervening, all, save an insignificant number, have done so.

## VI. The Litigation Should Come to an End.

The Louisville case which resulted in *Anderson* v. *Abbott*, 321 U. S. 349, did not involve, as does this case, any statute of limitations. The present suit was brought long

after the Louisville case was filed, and after the cause of action had become stale in Kentucky where it arose. Ohio G. C. Sec. 11234 was enacted for the purpose of protecting Ohio residents from harassment on outlawed claims. The decision sought to be reviewed properly applied Sec. 11234 to carry out this purpose. The Ohio decisions are that statutes of limitations are statutes of repose and are to be favorably applied. *Townsend* v. *Eichelberger*, 51 O. S. 213, 216 (1894).

This suit has now been pending just about ten years, and it is more than fifteen years since April 1, 1931. From the judgment entry (R. 30-31) and the record, it is apparent that there are numerous defendants, many holding comparatively small amounts of stock. In fifteen years, the interest at six per cent has almost equalled the amount of the assessment. The decision sought to be reviewed is correct and in accordance with decisions of this Court: the assessment and notice could have been sued on at law, as in debt, and the suit happens to be in equity as a concurrent remedy. The suit does not involve a right created by Congress cognizable only in equity. The maxim, *debet esse finis litium*, seems applicable and the petition should be denied.

Respectfully submitted,

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